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IN THE

Supreme Court of the United States

October Term, 1977
No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioners,

vs.

ALLAN BAKKE,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

Brief of the Chamber of Commerce of the United States of America Amicus Curiae.

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INTEREST OF THE AMICUS CURIAE.[1]

The Chamber of Commerce of the United States of America is the largest association of business and professional organizations in the United States and is a principal spokesman for the American business community. The Chamber of Commerce has a direct membership of more than 3700 state and local chambers of commerce and professional and trade associations, and over 65,000 business firms.

In order to represent its members' views on questions of importance to their vital interests and to provide such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated

[1]This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(2). Letters of consent are on file with the Clerk of this Court.

as *amicus curiae* before this Court in civil rights cases which involve significant labor relations issues. *E.g., General Electric Co. v. Gilbert,* 429 U.S. 125 (1976); *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976); *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976); *Albermarle Paper Co. v. Moody,* 422 U.S. 405 (1975); and *DeFunis v. Odegaard,* 416 U.S. 312 (1974).

Members of the Chamber are employers with a direct interest in the constitutional issue presented by this case. The Chamber is vitally interested in the development and implementation of programs and policies designed to eliminate discriminatory practices in employment. The Chamber has adopted the following policy affirming its commitment to equal employment opportunity:

> "The prevention of arbitrary discriminatory practices in employment should be of vital concern to every citizen. The National Chamber reaffirms its strong support of all reasonable and necessary steps designed to achieve the goal of equal employment opportunity for all, and encourages private, federal and state government action designed to achieve that end.
>
> "Governmental action should be carefully guided by basic constitutional concepts to insure fairness and due process of law for all the parties. Reverse discrimination is the antithesis of equal employment opportunity."

This Court's decision as to whether a state supported professional school may allocate a specific number of places in its entering class to minority applicants solely on the basis of their race will be read carefully by

the lower courts, government agencies, employers and unions for guidance as to the validity of affirmative action programs in employment. Employers require and are anxiously awaiting guidance on this crucial question because of the present uncertainty created by conflicting principles simultaneously pursued by the state and federal governments. On the one hand, employers are confronted with a complex array of federal and state antidiscrimination laws making illegal any racial discrimination or racial preference in employment. *See, e.g.,* Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e *et seq.* (1974). On the other hand, many employers have been required as a condition of doing business with federal, state and local agencies to commit themselves to affirmative action programs to increase the employment and promotion of minorities and women according to prescribed statistical representation formulae. *See, e.g.,* Executive Order No. 11246 and implementing regulations, Revised Order No. 4, 41 C.F.R. § 60-1.4, 41 C.F.R. § 60-2 (1976) and Revised Order No. 14, 41 C.F.R. § 60-60 (1976). The consequences to an employer of a failure to reach such imposed affirmative action "goals" are so severe, that employers inevitably treat the goal as a quota and give preferences to applicants and employees on the basis of their race or sex. Such action may, of course, violate the antidiscrimination statutes. *Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971). Employers thus are on the horns of a dilemma: they may refuse to use quotas and goals and forego valuable government contracts or they may come into compliance and face the risks of back pay liability for violations of Title VII and similar legislation.

It is the position of the Chamber that any kind of racial classification including a numerical racial quota or goal is so inimical to the fundamental and overriding principle of nondiscrimination that it should be imposed by government with extreme caution only as a remedy for specific instances of proven past discrimination and then only when accompanied by safeguards to insure that the remedy adversely affects the employment opportunities of qualified nonminority persons only to the extent necessary to right the wrong.

STATEMENT OF THE CASE

Allan Bakke applied for admission to the University of California at Davis Medical School in 1973 and 1974. He was denied admission in both years. In each of these years Bakke was subjected to an intensely competitive admission process for eighty-four of the 100 places in the entering class. The Medical School, pursuant to faculty resolution, established a separate admissions process for the remaining sixteen places in the class. To be considered for one of the sixteen segregated places an applicant had to be a member of one of four designated racial and ethnic minorities. Although the segregated section of the class is designated as a "program to increase opportunities in medical education for disadvantaged citizens," the University now candidly acknowledges that "in practice" only racial and ethnic minorities are considered and admitted under the program. Brief for Petitioner at 5. Thus, there is no question but that this case involves the intentional use of a racial classification by the University in the

administration of its admissions program. The result is a segregated admission process: one admission procedure and standard for minorities and a wholly separate admission procedure encompassing a far more rigorous standard for nonminorities.

SUMMARY OF ARGUMENT

I

The Constitution must be administered according to neutral and objective principles. There are not, nor should there be, segregated standards of judicial review for white and black persons under the Equal Protection Clause—a strict scrutiny standard to evaluate classifications challenged by minority persons and a far less rigorous standard to evaluate classifications challenged by whites and nonspecified minority persons. The language of the Fourteenth Amendment and this Court's own cases require a single standard of review for racial classifications. The lesser standard of review proposed here by Petitioner and Amici is unworkable as a constitutional concept. It requires a court initially to make a value-laden judgment as to whether a particular classification helps or hurts the "favored" class. Next, it requires the court to reference the race of the decision maker and the applicable census reports to determine whether the classification is imposed by a majority against a minority. The threshold judicial evaluations necessary under the proposed standard all but eliminate the possibility of a neutral and objective standard.

Segregated standards of equal protection are no less offensive to popular ideas of equality than separate

restrooms, water fountains, or accommodations. The only possible interpretation of the Equal Protection Clause is that it demands equality of protection for individual persons not equality between groups of persons. Racial classifications are "odious to a free people" and must be shown to be necessary to the achievement of a compelling government interest.

II

This is not a case in which the racial classification benefits a favored group without impinging upon the rights or expectations of others. The allocation of an extremely scarce government resource on the basis of race is by no means the equivalent of transferring teachers or students to schools outside their neighborhood. *Swann* and its progeny are not within the ban of the Equal Protection Clause. This case is wholly different. The classification here operates as a denial and is thus subject to the intense scrutiny of the Fourteenth Amendment.

Apart from the wartime cases of *Korematsu* and *Hirabayashi,* this Court has found only one government interest to be sufficiently compelling to justify the use of a racial classification. Courts have suffered the use of race as the basis for formulating a remedy for a specific instance or pattern of illegal or unconstitutional race discrimination by the institution against which the remedy is ordered. Courts have treated even such remedial uses with great suspicion and have carefully circumscribed the limits of the remedies in order to protect, as much as possible, the rights and expectations of those innocent nonminority persons who must personally bear the direct and immediate costs of the remedy.

The requirement of a finding of specific past discrimination as a prerequisite to the use of a racial remedy is the only logical and principled way to limit the use of a racial classification so as to make such use consistent with the Constitution. To sanction the concept of past societal discrimination is to permit the indiscriminate use of a disfavored classification whenever a group can persuade a decision maker that it was once the victim of discrimination. The result of the adoption of such a concept will be to splinter this nation into its component groups and to set each group against other groups and individuals in a struggle to gain an allocation. The limitation of racial remedies to specific past discrimination is wise policy as well as sound constitutional law. Such a standard permits relief for specific wrongs and yet insures that nonminority persons suffer denials or deprivations only where the circumstances are compelling.

The University may properly use racial classifications only under limited circumstances where it has demonstrated that the classification is necessary to the achievement of a compelling government interest. The University has failed completely in its efforts to meet its burden. It has offered after the fact justifications for an imprudently adopted classification. The showing of necessity rests only upon hypothesis and conjecture, not experience. The single most salient fact in this

case is that the *University has tried nothing else*. The Fourteenth Amendment at a minimum requires of a racial classification that it be the last, and not the first, resort of the state. The course adopted by the esteemed court below imposes a burden on the University to try other, less offensive means, to achieve its ends. It is a sensible course of moderation and should be endorsed by this Court.

III

The reservation of a specific number of places to be filled only by persons of specified races or ethnic backgrounds is properly denominated a quota. A racial quota cannot withstand constitutional scrutiny under any circumstances. A quota is the most arbitrary and irrational of classifications. The quota in this case makes race absolutely determinative of admission without consideration of relative qualifications or availability. A quota implies a substantive right to a specified and particular allocation to individuals of government resources and largesse based only upon the relative numbers of persons of that group affiliation in the population at large. This quota cannot be saved by denominating it a goal. A numerical racial goal, when backed by the substantial coercive efforts of the state, inevitably becomes a quota.

The goal of a nondiscriminatory society where bounty and burden fall equally upon individuals, not races, is universally revered—the only question in this case is whether a most discredited means is justified as a rational means to the end. It does not serve the creation of an integrated nation for the government to impel ever sharper and more meaningful consequences of race.

ARGUMENT

I

The Constitution Commands a Single Standard for the Evaluation of the Constitutionality of Racial Classifications Under the Equal Protection Clause of the Fourteenth Amendment: All Racial Classifications Are Properly Subject to Strict Scrutiny Which Must Find Them to Be Necessary to the Achievement of a Compelling Government Interest.

The Constitution must be administered according to neutral and objective principles. The fourteen words which make up the last phrase of the first section of the Fourteenth Amendment have had a powerful impact on American society. Those few words have dismantled the massive edifice of a segregated society and have, in part due to the continuing guidance of this Court, educated a generation of Americans to deplore as evil, policies which would distribute the fruits and burdens of American life on the basis of race. *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967); *Lee v. Washington*, 390 U.S. 333 (1968).

This Court has repeatedly insisted that racial classifications are "immediately suspect" *Korematsu v. United States*, 323 U.S. 214, 216 (1944); "odious to a free people" *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); and "obviously irrelevant and invidious" *Goss v. Board of Education*, 373 U.S. 683, 687 (1963). The Court has specified that a "very heavy burden of justification" is necessary to sustain such classifications. The classification must be shown to be necessary to the accomplishment of a compelling state interest. *Loving v. Virginia*, 388 U.S. 1, 9 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964).

Now Petitioner and Amici urge that the great principle of nondiscrimination embodied in the Equal Protection Clause protects some persons more than others. They argue from a majoritarian premise that when a racial classification is "benign" with respect to a racial minority and discriminates only against a racial majority it is properly subject to a lesser degree of judicial scrutiny under the Fourteenth Amendment.

There is nothing in the language of the Amendment itself which suggests the propriety of a double standard for racial classifications. The Amendment quite plainly bars a state from denying to "*any person* within its jurisdiction the equal protection of the laws."[2] Nor has there been any suggestion from this Court that the command of the Fourteenth Amendment speaks more softly when nonminorities are discriminated against.[3] In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) the Court spoke in unequivocal language:

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[2]This Court has construed similarly worded statutes derived from the same antidiscrimination principle as the Fourteenth Amendment to protect white citizens from discrimination with the same vigor as they protect black citizens. In *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), this Court held that both Title VII of the Civil Rights Act of 1964 and Section 1981 of Title 42 of the United States Code encompass claims of discrimination by white persons as well as claims by nonwhite persons. To be sure, this Court emphasized it was not considering in that case the permissibility of an affirmative action program, "whether judicially required or otherwise prompted." 427 U.S. at 280-81 n.8. The case is cited here not as authority for the reserved question of the ultimate validity of such programs, but rather for the proposition that the Fourteenth Amendment requires a single standard for the evaluation of racial classifications.

[3]Almost without exception, other courts which have considered the question, including the court below, have applied the same strict standard of review to classifications challenged by nonminority persons as is used in reviewing classifications

(This footnote is continued on next page)

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' *These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality;* and the equal protection of the laws is a pledge of the protection of equal laws." *Id.* at 369 (emphasis added).

The proposed double standard for judicial review of racial classifications under the Fourteenth Amendment is unsuitable as a constitutional concept. It would require a court to reference the race of the decision maker or the constituency from which it is drawn to determine whether the classification involves a discrimination by the majority against a minority.[4] The double standard would also require a value-laden judgment by members of the judiciary as to whether the

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challenged by minority persons. *See, e.g., Bakke v. Regents of the University of California*, 18 Cal. 3d 34, 53 P.2d 1152, 132 Cal. Rptr. 680 (1976); *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973); *vacated as moot*, 416 U.S. 312 (1974); *Harper v. Mayor of Baltimore*, 359 F. Supp. 1187 (D. Md. 1973), *modified on other grounds sub nom, Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973). *But see, Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 348 N.E. 2d 537, 384 N.Y.S.2d 82 (1976).

[4]It would be an anomalous and unprincipled result for the Equal Protection Clause to demand strict scrutiny for a black preference which discriminates against whites in Washington, D.C. (71.9% black) or Newark (54.2% black) but deny the same scrutiny to a black preference in Los Angeles (17.9% black). U.S. Bureau of the Census, Census of Population 1970, Vol. I, Characteristics of the Population, Parts 6, 10, 32.

ultimate impact of a racial classification is good or bad with respect to a particular group.[5]

In addition, the internal logic of the majoritarian premise of the double standard rests upon unsupportable assumptions. It assumes that a white majority is homogenous, rather than a conglomeration of persons of differing ethnic and religious affiliations, many of whom remain the objects of bigotry and prejudice to the present day. The Supreme Court of New Jersey in finding a racial classification impermissible under New Jersey statutes and the New Jersey Constitution soundly rejected the majoritarian premise, stating: "We are a state of minorities." *Lige v. Town of Montclair,* 72 N.J. 5, 15, 367 A.2d 833, 843 (1976). *See,* Lavinsky, *DeFunis v. Odegaard: The "Non-Decision" with a Message,* 75 Colum. L. Rev. 520, 527 (1975); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities,* 1974 S. Ct. Rev. 1, 25.

The majoritarian premise assumes that every decision by government is subject to the will of the majority, ignoring the isolation of many decision making bodies from the majoritarian process. The decision to impose the racial classification in this case was made by the

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[5]It cannot be assumed that it will always be easy to determine whether a racial classification is benign or malignant, even as to a specified minority. *See, e.g., Otero v. New York City Housing Authority,* 484 F.2d 1122 (2d Cir. 1973). Consider also, Professor Posner's suggestion that a limitation on the number of Jewish persons in the professions might assertedly be benign, having the ameliorative purpose of decreasing anti-Semitism. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities,* 1974 S. Ct. Rev. 1, 20. Moreover, courts must also be wary that a classification benign as to one group may impact adversely on another minority.

faculty of the University of California at Davis Medical School. Decisions on educational policy are properly made by such institutions and faculties are properly free from political pressures in accord with the principles of academic freedom. Nevertheless, the isolation of the decision maker from the majoritarian process in this case makes it imperative that courts scrutinize this use of a racial classification most strictly.[6] The rationale underlying various doctrines of judicial restraint contemplate judicial deference to legislative judgments. The factual basis for such deference is entirely lacking here where the decision to institute a racial classification was not a product of the political processes of the state legislature.[7]

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[6]*See,* Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role,* 42 U.Chi. L. Rev. 653 (1975):

> "Nothing in the relationship of the faculty to the public makes it likely that the faculty will learn whether a decision to grant preferences to certain racial or ethnic groups imposes unduly heavy costs upon other groups in the society or whether there are still other groups that might plausibly lay claim to a similar preference. Of course, law faculties are not wholly insulated from outside pressures, but their processes of decision are a good deal less likely than those of legislatures to elicit such information. Faculties are, moreover, less constrained than legislatures by the need to obtain public consent for their actions, creating a danger that the choices they make will depart too widely from the values of the larger society. This danger is enhanced by the fact that, for all their diversity, faculties are relatively insular communities, subject to distinctive pressures and a tendency to form distinctive outlooks upon issues. Encompassing less diversity than the larger population, they are relatively more prone to fall victim to those enthusiasms and waves of passion that befall small groups and justify lodging decision-making authority in larger groups." *Id.* at 696 (citations omitted).

[7]To the extent that polls reflect majority will, the Gallup Poll taken between March 25th and March 28th, 1977 reveals that a striking majority of Americans (86% of white respondents

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Adoption of the standard of review urged by Petitioner in this case based upon the majoritarian premise would amount to rejection of the idea that constitutional rights are personal rights. Such a holding would in fact submerge the rights of Allan Bakke to the claimed needs of unidentified individuals, none of whom have shown they were wronged, solely on the basis of their membership in favored groups. This Court has never endorsed the concept of group rights; to the contrary, the Court has scrupulously adhered to the doctrine that constitutional rights, in particular Fourteenth Amendment protections, are personal rights:

> "The rights created by the first section of the Fourteenth Amendment *are, by its terms, guaranteed to the individual. The rights established are personal rights.* It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer,* 334 U.S. 1, 22 (1948) (emphasis added).

See also, Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 351 (1938); *Sweatt v. Painter,* 339 U.S. 629, 635 (1950).

Most fundamentally, the notion of a segregated equal protection standard embodied in separate ideas of black equality and white equality does violence to the most basic perceptions of fairness in our society. Segregated

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and 64% of nonwhite respondents) reject the notion of preferential treatment on the basis of race or sex in selecting persons for employment and places in college. Los Angeles Times, May 1, 1977, § 1, at 9, col. 3; New York Times, May 1, 1977, § 1, at 33, col. 1.

standards of equal protection are no less offensive to popular ideas of equality than separate restrooms, water fountains or accommodations. The idea conjures up the Orwellian spectre of *Animal Farm* where the principle of equality became perverted into "All . . . are equal, but some . . . are more equal than others."[8]

The proper standard of review in this case is strict scrutiny. Any suggestion of the appropriateness of a lesser standard here must be unequivocally rejected. The classification must fall unless the University demonstrates that it is justified by a compelling interest and is necessary to the achievement of that interest.

II

The Racial Classification Embodied in the Task Force Program at the Medical School of the University of California Violates the Equal Protection Clause of the Fourteenth Amendment Because It Is Not Necessary to the Achievement of a Compelling Government Interest.

A. The Racial Classification Herein Works a Deprivation Upon Individuals and Falls Within the Purview of the Equal Protection Clause.

Only one hundred students may be admitted in any one year to the Medical School. The racial classification permits specified racial and ethnic minority students to occupy a certain number of seats in the class. Because the absolute number of places is limited, the racial classification operates as a denial of opportunity to nonminority persons—specifically it denies nonminority persons the opportunity to be considered for the reserved places in the entering class. Since this racial

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[8]G. Orwell, *Animal Farm,* 168 (1946).

classification works a deprivation upon individuals it comes within the limitations of the Equal Protection Clause cases. This is not a case like *Katzenbach v. Morgan,*[9] 384 U.S. 641 (1966) or *Lau v. Nichols,*[10] 414 U.S. 563 (1974) where the impact of the racial classification upon nonminority persons is neither to burden nor to deny. Those cases are not questionable under the Equal Protection Clause.

The dicta in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971), relied on by Petitioner and Amici, is similarly inapposite. There the Court suggested that a school board for educational reasons might constitutionally choose to assign its students to schools by race in order to achieve a specific ratio of black to white children in each school. The result suggested by the *Swann* dicta is far different from the result of the University's racial classification herein. The *Swann* dicta deprives no child of an education nor does it result in a denial of a right or opportunity to any person. The burdens and benefits of integration fall evenly on children of all races.[11] As Justice Douglas declared in the *DeFunis* case:

> "[T]here is a crucial difference between the policy suggested in *Swann* and that under consideration here: the *Swann* policy would impinge on no person's constitutional rights, because no one would be excluded from a public school and no one has a right to attend a segregated public school." 416 U.S. 312, 336 n. 18 (1974) (Douglas, J., dissenting).

[9]*Katzenbach v. Morgan* held that a law extending the franchise to some Spanish-speaking persons was not a denial of equal protection.

[10]*Lau v. Nichols* held that a school district was obliged under Title VI of the Civil Rights Act of 1964 to provide language instruction to non-English speaking Chinese children.

[11]The faculty integration cases relied on by Petitioner are similarly distinguishable. *E.g. United States v. Montgomery County Board of Education,* 395 U.S. 225 (1969). No teacher has a right to teach in a particular school nor to teach children of a single race. A teacher transfer to promote integration involves no deprivation and thus constitutes no denial of equal protection.

The racial classification in this case flatly denies whites and nonspecified minorities access to the segregated places in the entering class in order to make these places available to members of specified racial and ethnic groups solely because of their race or ethnicity. Thus this classification constitutes a denial of equal protection unless it is properly justified under strict scrutiny.

The argument is made in various forms by Petitioner and Amici that the intent of the University in this case was only to prefer a class of minority persons rather than invidiously to discriminate against members of the Caucasian race, citing *Washington v. Davis,* 426 U.S. 229 (1976) and *Village of Arlington Heights v. Metro. Housing Corp.,* 97 S.Ct. 555 (1977). This argument, however, would unduly restrict the meaning of the word "discriminate". According to one definition, to discriminate means "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit,"[12] *Webster's Third New International Dictionary,* 648 (1961). Invidious is not synonymous with hostile; rather it is a term representing

[12]This definition of discrimination is consistent with the use of the word in the Civil Rights Act of 1964. On April 8, 1964 Senators Clark and Case, floor managers for H.R. 7152, introduced an interpretative memorandum on Title VII into the record which provided in pertinent part:

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a legal conclusion. An intentional discrimination on the basis of race is "invidious" if it results in a deprivation and cannot be justified by a compelling government interest. In this case, as in the case of Marco DeFunis, the classification "is certainly not benign with respect to nonminority students who are displaced by it." *DeFunis v. Odegaard*, 82 Wash. 2d 11, 32, 507 P.2d 1169, 1182 (1973), *vacated as moot*, 416 U.S. 312 (1974). The difference in treatment in this case was intentional and operates to deny a benefit to persons on the basis of their race—thus it is unlawful discrimination, absent a compelling justification.

B. The Only Compelling Government Interest Which Properly Justifies the Use of a Racial Classification Is the Necessity to Remedy Specific Past Racial Discrimination by the Institution Using the Classification; Such a Compelling Interest Is Not Present in This Case.

Since the wartime emergency cases of *Korematsu v. United States*, 323 U.S. 214 (1944), and *Hirabayashi v. United States*, 320 U.S. 81 (1943),[13] this Court has suggested only one interest compelling enough to justify the use of a racial classification—the govern-

"It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor. . . ." 110 Cong. Rec. 7213 (1964).

[13] *Korematsu* (exclusion from West Coast areas) and *Hirabayashi* (curfew order) upheld wartime restrictions upon Japanese-Americans on the grounds of military necessity. The cases have been severely criticized by most commentators. *See generally*, Rostow, *The Japanese American Cases—A Disaster*, 54 Yale L.J. 489 (1945); Dembitz, *Racial Discrimination and the Military Judgment*, 45 Colum. L.Rev. 175 (1945).

ment's interest in redressing the effects of an identified instance or pattern of illegal or unconstitutional racial discrimination.

Specifically, this Court has sanctioned the use of racial classifications to dismantle the dual school systems resulting from past de jure segregation. In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 (1971) the Court declared racial classifications to be useful "in shaping a remedy to correct past constitutional violations." *See also, North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971).

The school desegregation cases represent both a situation where there is no denial of benefit or right and a situation where a racial classification is justified as a necessary device for the compelling interest of remedying a specific constitutional wrong. The Court has insisted, however, even in these cases, that the remedy ordered may not exceed the scope of the wrong demonstrated: "Absent a constitutional violation, there would be no basis for judicially ordering assignment of students on a racial basis." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 28. In *Milliken v. Bradley (Milliken I)* 418 U.S. 717 (1974), the Court struck down a desegregation order which directed an interdistrict remedy for the entire Detroit metropolitan area after a finding that the Detroit school board had pursued a deliberate course of segregation, reasoning that "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." *Id.* at 745. Similarly, in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 436-437 (1976), the Court insisted that once a constitutional violation was remedied by the

implementation of a racially neutral attendance policy, the power of a federal court to order a racial remedy was ended.

In another remedial context, this Court has permitted the use of a racially based award of retroactive seniority under Title VII when made to identifiable black victims of proven employment discrimination. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). The racial remedy permitted there was firmly limited to those persons who demonstrated that they were victims of prior discrimination. *See also, International Brotherhood of Teamsters v. United States*, 45 U.S.L.W. 4506, 4516-18 (May 31, 1977). *Cf. Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971).

The restrictions upon the scope of the permissible remedies for constitutional and statutory violations recognized in the school desegregation cases and in *Franks* and *Teamsters* mandates that the only interest compelling enough to justify the use of a racial classification is the interest in remedying a specific finding of past discrimination by a particular institution.

The case of *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 97 S. Ct. 996 (1977) is not contra. There the Court permitted the State of New York to use racial criteria in an apportionment plan adopted pursuant to Section 5 of the Voting Rights Act of 1965, despite a claim that the racial criteria had the effect of diluting the voting strength of a white ethnic and religious minority enclave. A majority of this Court concluded that the use of the racial classification to secure the approval of the Attorney General to a reapportionment plan under the Voting Rights Act of 1965 did not violate the Fourteenth

or Fifteenth Amendments given the broadly remedial purposes of the Act.

Despite the fact that there was no finding of prior discrimination in districting or apportionment in the area concerned, the case is within the line of authority permitting racial classifications to remedy specific past discrimination. This Court has recognized that the Voting Rights Act is a last-resort type of remedy for racial discrimination in voting, adopted as a direct result of Congressional frustration with the "unremitting and ingenious defiance of the Constitution" by the states. *See South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). As a result the statute establishes a presumption of discrimination from the presence of certain conditions often correlated with racial discrimination in voting. The statutory indicia were present in the area of New York covered by the challenged apportionment. The state tried and failed to rebut the presumption of discrimination pursuant to Section 4(a) of the Act in a declaratory judgment action brought in the district court for the District of Columbia. The district court denied the exemption and this Court summarily affirmed. *New York on Behalf of New York County v. United States*, 419 U.S. 888 (1974). Thus, although there was no specific showing of past racial discrimination in apportionment, the presence of the statutory indicia and the failure to secure exemption under Section 4(a) is the functional equivalent of a finding of past discrimination for which a racial classification is appropriate and constitutionally tolerable.

Thus in each case since *Korematsu* and *Hirabayashi*, where this Court has approved a racial classification, it has done so in the context of formulating a remedy

for an identified statutory or constitutional violation.[14] In no case has this Court condoned the use of a racial remedy where it is not related to the elimination of a specific instance or pattern of illegal or unconstitutional discrimination.

Most federal courts of appeal and federal district courts have permitted the use of mandatory racial and ethnic classifications only as a remedy for specific and serious violations of the antidiscrimination provisions of Title VII, and Sections 1981 and 1983 of Title 42 of the United States Code.[15] Courts, moreover, have been loath to approve such remedies and have imposed strict limits upon their use, requiring a "compelling necessity" for the classification. *See, e.g., Patterson v. American Tobacco Co.*, 535 F.2d 257, 274 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976).

In a number of cases, the necessity for the remedy has been shown by the extreme intransigence of an

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[14]*Morton v. Mancari*, 417 U.S. 535 (1974) is cited by Petitioner and various Amici as a case where this Court upheld a racial preference which operated to deny employment opportunities to white employees in the Bureau of Indian Affairs. However, the Court took pains in that case to deny that the challenged preference was based on race. The Court considered the classification to be political rather than racial, because it extended the employment preference to only those native Americans who were members of "federally recognized" tribes. *Id.* at 553-54 and n.24. Moreover, the Court emphasized the importance of the tie between the preferred Indians and the fulfillment of Congress' unique obligation toward the Indians implicit in the "guardian-ward relationship." *Id.* at 551. The *Mancari* case was described by this Court as *sui generis* and provides no authority for the broad issue presented in this case.

[15]*See, e.g., Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied sub nom., Director of Civil Service v. Boston Chapter NAACP, Inc*, 421 U.S. 910 (1975); *Rios v. Enterprise Ass'n. Steamfitters Local 638*,

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institution in remedying discrimination by other means. *See, e.g., Carter v. Gallagher*, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974); *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974).

Lacking a showing of necessity even in cases of proven discrimination, courts have declined to permit racial remedies. *See, e.g., Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973); *Pennsylvania v. Glickman*, 370 F. Supp. 724, 736-37 (W.D. Pa. 1974); *Wade v. Mississippi Cooperative Extension Service*, 372 F. Supp. 126, 146-47 (N.D. Miss. 1974), *aff'd in part, rev'd in part on other grounds*, 528 F.2d 508 (5th Cir. 1976); *Officers for Justice v. Civil Service Commission*, 395 F. Supp. 378, 387 (N.D. Cal. 1975).

In a few cases, courts of appeal have sustained the use of racial classifications embodied in affirmative action programs where there was no *judicial* finding of prior illegal discrimination. *See, e.g., Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); *Southern Illinois Builders Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). In each of these cases, however, there was

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501 F.2d 622 (2d Cir. 1974); *United States v. Iron Workers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *United States v. Local 212 IBEW*, 472 F.2d 634 (6th Cir. 1973); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir.), *cert. denied* 419 U.S. 895 (1974); *United States v. International Union of Elevator Const. Local No. 5*, 538 F.2d 1012 (3d Cir. 1976); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972).

a strong and unquestioned pattern of racial discrimination by the unions from which the contractors hired. For example, in *Associated General Contractors* the court stated: "It is undisputed that past racial discrimination in Boston's construction trades is in large part responsible for the present racial imbalance." 490 F.2d at 21. The *Southern Illinois* court specifically found that the Ogilvie Plan attempted to eliminate past discrimination by the construction unions in the area. 471 F.2d at 686. In most of these cases, there was as well a specific finding that the program would result in no harm to nonminorities. In *Contractors Ass'n of Eastern Pennsylvania,* for example, the court specified that the contractors could commit themselves to specific employment goals "without adverse impact on the existing labor force." 442 F.2d at 173.

In each of the cases where courts have mandated or approved racial remedies, they have done so upon a showing of past racial discrimination by the party against which the remedy is imposed. The requirement of a finding of past racial discrimination as a prerequisite to the imposition of a racial classification serves an important policy purpose. The requirement limits the use of a racial classification to that necessary to right a specific and identifiable wrong, defining the scope of the wrong and the appropriate remedy. So limited and defined, the remedy protects, as much as is possible, the rights and expectations of innocent nonminority persons who must bear the direct costs of the remedy.

The University would have this Court abandon the wisdom of this policy and permit it to justify the racial classification at the Medical School as necessary to remedy past discrimination by society in general

against the groups favored by the classification. In no case has a court validated the use of a racial classification as a remedy for nonspecific discrimination. The course advocated by the University would be to abandon all protection for nonminorities afforded by equal protection and due process. It would substitute an unworkable concept for a principled constitutional doctrine of remedy. The proposed past societal discrimination precept is one which will vary, even for identified groups, from place to place, from time to time, and in degree. There is scarcely a religious, ethnic or racial group in the United States which does not have a colorable claim that it was the object of societal discrimination.[18] There is simply no principled way to compare or evaluate relative discrimination so as to balance the rights of those persons who are not content to rest their expectations upon group claims against those making group entitlement claims.

Societal discrimination as justification for a racial classification granting preference will inevitably foster a climate in which groups will compete for an appropriate allocation of scarce resources on the basis of their relative histories of past discrimination. Specific past discrimination is a workable constitutional and judicial concept. Societal discrimination cannot serve

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[18]*See, e.g., Lucido v. Cravath, Swaine and Moore,* 425 F. Supp. 123 (S.D.N.Y. 1977). (Italian, Catholic); *Marlowe v. General Motors Corp.,* 489 F.2d 1057 (6th Cir. 1973) (Jewish); *Fekete v. United States Steel Corp.,* 424 F.2d 331 (3rd Cir. 1970) (Hungarian ancestry); *Esponilla v. Trans-World Airlines, Inc.,* 7 FEP Cases 1102 (N.D. Cal. 1974) (Filipino ancestry); *Slamon v. Westinghouse Electric Corp.,* 8 FEP Cases 1325 (D.C. Pa. 1974) (Catholic); *Bradington v. International Business Machines Corp.,* 5 FEP Cases 1123 (D. Md. 1973) (Arab, Egyptian and Moslem); EEOC Dec. CL 68-12-431EU, 2 FEP Cases 295 (1969) (Polish); and EEOC Dec. 70-312, 2 FEP Cases 309 (1969) (German and Norwegian ancestry).

the same function because such a concept requires resolution by the political processes. Clashing group claims must seek balance in the political arenas and the result is a loss of the constitutional values of equal protection and due process for individuals.

Racial remedies are strong medicine, appropriate only to redress a specified evil. Racial remedies are not permissible absent the restraints of a finding of specific past discrimination. The Medical School faculty in this case instituted the racial classification wholly in the absence of any finding or inference of past racial discrimination by the school. Indeed, it is highly improbable that such a showing could be made since the doors to the school opened only one year before the program was adopted. The racial classification used at the Medical School is not designed to give relief to actual victims of illegal or unconstitutional racial discrimination. Thus there is no compelling interest justifying the use of this racial classification.

C. None of the Interests Asserted by the University to Be Furthered by This Racial Classification Have Been Shown to Be Both Compelling and Necessary.

The University has postulated a number of government interests which are assertedly compelling enough to justify the racial classification used at the Medical School. Most of these interests have been postulated as rationales only in the course of this lawsuit. The statement of the program in the record (Exhibits 1 and 2 to Deposition of George H. Lowrey, M.D., R. at 195-96) indicate the program is one "to increase opportunities in medical education for disadvantaged citizens." The effort by the University to demonstrate compelling government interests other than that stated in the record is entirely after the fact. The Medical

School transformed its constitutional classification of "disadvantaged citizens" into a constitutionally suspect racial classification without articulating its reasons. No white or nonspecified minority was considered for the program however educationally or economically disadvantaged. Now in the face of this lawsuit the University has produced a monumental tome asserting a plethora of interests all asserted to be compelling. There is no evidence that the faculty of the Medical School who adopted the program considered or evaluated the goals now asserted. In recent years this Court has refused to hypothesize conceivable state purposes for legislation, requiring instead a "legitimate, *articulated* purpose." *See, e.g., McGinnis v. Royster,* 410 U.S. 263, 270 (1973) (emphasis added); *Eisenstadt v. Baird,* 405 U.S. 438, 443 (1972). *Cf. James v. Strange,* 407 U.S. 128 (1972); *Weber v. Aetna Casualty and Surety Co.,* 406 U.S. 164 (1972). *See also, Schlesinger v. Ballard,* 419 U.S. 498, 511-12 and n.1 (1975) (Brennan, J., dissenting).

Moreover, the interests asserted cannot be shown to be both compelling and necessary. For example, the University asserts that there is a compelling educational interest in providing for diversity within the Medical School. One might legitimately question whether this interest, albeit important, rises to the level of compelling. It would not seem to be the moral equivalent of a wartime emergency or the need to redress specific instances of racial discrimination. Yet it is not necessary to debate this fine point of educational policy for the University cannot demonstrate that race or ethnicity is usefully correlated with the achievement of that goal. Surely factors other than physical characteristics such as skin color have the educational value

claimed by the University. Different backgrounds and life experiences produce persons with different values, aspirations and concerns who may contribute to the quality of education at the school. However, none of these factors are strictly related to race. Clearly, the University may constitutionally seek persons with differing backgrounds and experiences, without selecting persons solely by reference to their race or ethnic background. Diversity leading to enhancement of the educational experience as a government interest then cannot save this classification.

A second interest asserted as compelling is the urgent need to provide medical services to underserved minority communities. However, it should immediately be apparent that to recognize this need is not to demand a racial standard for admission to medical school. Medical needs can be served by doctors of all races and ethnic backgrounds. Race is almost irrelevant to this important interest. It is mere conjecture to conclude that only black doctors will have an interest in or be motivated to serve the medical needs of black persons. It has not been shown that only Chicano persons can serve Spanish-speaking people. The notion that black teachers cannot adequately teach white students or that white teachers cannot teach black students has been unequivocally rejected. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 19. *United States v. Montgomery Board of Education*, 395 U.S. 225 (1969); *Bradley v. School Board*, 382 U.S. 103 (1965).

Nor is a racial or ethnic preference a precisely tailored means of reaching the need for medical care in the ghettos and barrios. There is no certainty that

black or Asian or Chicano doctors choose in substantial numbers to serve the needs of their corresponding races. It has been strongly and properly questioned whether it is even a permissible goal for the state to attempt to produce black doctors for black persons. *DeFunis v. Odegaard*, 416 U.S. at 342 (Douglas, J., dissenting).

The military services have had success in meeting their needs for medical personnel through the solicitation of agreements to serve for a specified period of time in exchange for financial assistance. A similar program could be established to help meet the need of minority persons for medical services. In providing inexpensive medical education, the state is distributing an extremely valuable commodity to individual members of society. A state may, consistent with the Constitution, condition its distribution of the benefit upon a commitment by a minority or nonminority applicant to serve in needy areas for a specified period of time. To the extent that Petitioner's assumptions are borne out, black students and other minority and nonminority students may choose htis alternative and thereby secure admission to medical school resulting in the provision of medical services to those the state believes are most in need of them. But such a program would not violate other important constitutional values by distributing benefits solely on a racial basis. The compelling need for doctors to serve the medical needs of minority persons thus cannot justify the use of a racial classification in the admissions process.

The University claims the racial classification is justified by the need to provide racial and ethnic role models to young minority students and by the goal of integrating the medical profession. However, the

test of constitutionality of racial classifications demands more than an important purpose. The test demands that there be a strong congruence between the end chosen and the racial means adopted to promote the end. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), this Court specified with reference to suspect classifications:

> "[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Id.* at 343.

Under this standard, the University's efforts fall far short of demonstrating that the asserted goals could not be met by less onerous alternatives. The court below suggested several alternatives, all of which are castigated by Petitioner and Amici as hopelessly inadequate and unrealistic. However, the simple fact is that *the University in this instance has tried nothing else.*[17]

The Constitution does not command that the University use entrance examinations which do not adequately measure or predict the qualifications of persons not within the majoritarian culture. If some factors in the makeup of disadvantaged persons are not ade-

[17]Nor have other institutions tried non-suspect alternatives. For example, it was only after the decision below that there was a serious effort made at a major California law school to "begin to discover the state of the art on constitutionally safe approaches to special admissions programs." *Report on Special Admissions at Boalt Hall After Bakke*, 1 (1976). The report reveals that contacts with forty law schools requesting their experience with non-racially based disadvantaged programs resulted in the conclusion that "there is no real body of experience in dealing with a disadvantagement approach to special admissions." *Id.* at 8. *See*, Lavinsky, *A Moment of Truth on Racially Based Admissions*, 3 Hastings Const. L. Q. 879 (1977).

quately evaluated by traditional procedures, then other factors may and should be considered. Nothing in the Constitution bars the University from giving recognition to special achievements in the face of educational and economic hardships. The University is not barred from establishing remedial programs to assist disadvantaged students in acquiring the skills necessary to compete effectively with nonminority students. *Cf. Milliken v. Bradley*, (*Milliken II*) 45 U.S.L.W. 4873, 4879 (June 27, 1977); *Lau v. Nichols*, 414 U.S. 563 (1974). However, there is nothing in these problems which suggests or compels a racial classification in the admissions process at the Medical School.

A remedial classification for admission to the Medical School defined as a program for disadvantaged citizens, administered in a racially neutral way, is not constitutionally troublesome. Petitioner and Amici protest that a "disadvantaged" classification is unworkable. It is alleged that there can be no easy or precise definition of "disadvantaged." This argument is a familiar one, embodying the concept of "administrative convenience." Reduced to its simplest terms, the argument is that it is easier to decide who is black or Asian than it is to set up criteria which evaluate persons on their individual merits.[18] This Court has

[18]Of course, it should be readily apparent that it is not always so simple even to decide who belongs to particular racial groups. The definition of Chicano or a native American are particularly elusive, being not correlated satisfactorily with appearance, surname or dominant language. Moreover, in individual cases, even blacks or Asians may not be readily identifiable. *See*, B. Bittker, *The Case for Black Reparations*, ch. 10 (1973).

It appears in practice that the determinations as to race and ethnicity for purposes of special treatment for individuals are made in many professional schools by minority students themselves who tend to make such determinations on the basis of the

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repeatedly insisted, however, that the "administrative convenience" inherent in not having to evaluate individual cases cannot justify infringement upon important individual rights. As Justice Douglas stated in his dissent in *DeFunis:* "[W]e have never held administrative convenience to justify racial discrimination." 416 U.S. at 341 (Douglas, J., dissenting). *See also, Stanley v. Illinois,* 405 U.S. 645 (1972); *Reed v. Reed,* 404 U.S. 71 (1971); *Bell v. Burson,* 402 U.S. 535 (1971); and *Carrington v. Rash,* 380 U.S. 89 (1965).

The problem of ascertaining the membership of favored racial groups is one of the most distasteful aspects of programs like the Medical School's plan. As Professor Bittker has observed, there is no process that can be more aptly characterized as racist than the pseudo scientific one of determining whether a person belongs to one race or another. B. Bittker, *The Case for Black Reparations,* 96-97 (1973), The problem is not simply hypothetical. To sanction the use of racial criteria as a proper basis for distribution of government benefits is to make legal consequences flow from race. Experience in other nations where race is determinative of legal, economic and social position has been that individuals will struggle to be declared in or out of preferred or burdened racial groups.[19] Inevitably ugly

acceptability of the individual's political thinking to the minority students. Certainly such a system has dangerous implications for the First Amendment. *See* Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities,* 1974 S. Ct. Rev. 1, 13.

[19]It is not to be denied that the opportunity to receive a medical education in this society is a highly valuable and sought after benefit. Medical doctors have an extremely high income potential and many persons wish to become doctors. It is virtually certain that some will claim entitlement to a racial preference for entry into medical school whose entitlement

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controversies over who is and who is not black or brown will spill over from institutions and employers to the courts of this nation. Standards for race and ethnicity will have to be developed and utilized to distribute fairly the segregated places in classrooms and workplaces.

Petitioner and Amici also argue that the disadvantaged classification is unworkable because the overwhelming number of poor people, some 85%, are white. These statistics are meaningless in the present context since all poor people do not possess the requisite minimum qualifications for medical school, nor are they of an age appropriate for consideration. There is no reason to believe that the 85% statistic can properly be extrapolated into a comparable figure for college graduates with the required pre-med background.

The University's failure to provide the court appropriate statistics simply underlines the University's complete lack of experience in administering such a program. Moreover, there is no reason to assume that income levels alone describe the disadvantaged classification, rather such a classification should also attempt to evaluate the adequacy of an individual's educational background.[20]

The University does not offer this Court proof from experience that this racial classification is necessary

will be challenged on the ground that they are not really black, or black enough or on the ground that their surname is actually Italian or Greek rather than "Spanish."

[20]*See* Novick & Ellis, *Equal Opportunity in Educational and Employment Selection,* 32 American Psychologist 306 (1977) which suggests that research in statistical decision theory might produce devices to measure individual disadvantage and individual utilities. If this is borne out, the "disadvantaged" classification may well be more manageable than the University presently asserts.

to achieve its interests.[21] Rather, Petitioner and Amici bombard the Court with statistics, many of which represent extrapolations based upon unproven assumptions, purporting to demonstrate that professional schools will be lily-white enclaves absent these programs. The Supreme Court of California determined that to justify this racial classification the University must do more than hypothesize the necessity of the classification. It must demonstrate necessity by experience, not conjecture. The course charted by the court below is one of moderation—it merely demands that a racial classification should be the last, not the first and only, tool employed by the government to achieve its desired ends. Certainly the Supreme Court of California has an outstanding record of concern for the civil rights of minority groups and disadvantaged citizens. The court has been in the forefront of expanding constitutional protections. *See, e.g., Crawford v. Board of Education of the City of Los Angeles,* 17 Cal. 3d 280, 130 Cal. Rptr. 724, 551 P.2d 28 (1976); *San Francisco Unified School District v. Johnson,* 3 Cal.3d 937, 92 Cal.Rptr. 309, 479 P.2d 669 (1971); *Sail'er Inn, Inc. v. Kirby,* 5 Cal.3d 1, 95 Cal.Rptr. 329, 485 P.2d 529 (1971); *Serrano v. Priest,* 5 Cal.3d 584, 96 Cal.Rptr. 601, 487 P.2d 1241 (1971);

[21]Moreover, it may be questioned whether the University itself considers its asserted purposes to be truly compelling since they assert that unless their racial classification is upheld they "would simply shut down their special admissions programs." Brief for Petitioner at 14. Such an abandonment of purpose is hardly consistent with the University's vigorous assertions of the urgent necessity to achieve the claimed ends.

In re Antazo, 3 Cal.3d 100, 89 Cal.Rptr. 255, 473 P.2d 999 (1970); *Perez v. Sharp,* 32 Cal.2d 711, 198 P.2d 17 (1948). The moderate course proposed by the court below is appropriate. It represents a reasoned and balanced approach to a difficult set of problems. As such, it should be affirmed by this Court.

III

Even if in the Present Case There Is a Compelling Government Interest to Support a Racial Classification, the Government May Not Use a Numerical Quota or Goal to Achieve Such an Interest Without Violation of the Equal Protection Clause of the Fourteenth Amendment.

A. The Task Force Program at the Medical School Is a Numerical Racial Quota.

It is now absolutely clear that the University may not pursue a policy of reserving even one place in any class exclusively for a white person. Yet, in this case the University has fixed a specific numerical quota of sixteen for the admission of applicants from four specified minority groups without regard for relative qualifications or availability. White applicants are not considered for any of the sixteen segregated places. The reservation of a specified number of places to be distributed by absolute preference to individuals of particular racial or ethnic backgrounds and to no others is properly denominated a racial quota.

B. Whenever a Numerical or Percentage Value Is Assigned to a Racial Goal and Such a Goal Is Backed by Government Coercion, the Result Is a Quota.

Employers subject to contract compliance affirmative action plans imposed by federal, state and local governments are well acquainted with numerical goals or quotas designed to increase the employment and promotion of women and specified minorities according to prescribed statistical representation formulae. In the experience of employers, the assignment of a numerical or percentage of workforce value to a "goal" when such assignment is accompanied by government coercion inevitably results in the goal becoming a quota. The process whereby a numerical value "goal" becomes a quota may appropriately be demonstrated by reference to the Executive Order program.

Executive Order 11246, as amended, requires that government contractors and subcontractors agree not to discriminate on the basis of race, color, religion, sex or national origin and in addition to take "affirmative action" to ensure that there is no discrimination. However, the implementing regulations go much farther than nondiscrimination; the regulations specify the creation of affirmative action plans for specified minorities and women based upon the concept of pro rata representation. *See* Revised Order No. 4, 41 C.F.R. § 60-1.4, 41 C.F.R. § 60-2 (1976) and Revised Order No. 14, 41 C.F.R. § 60-60 (1976).

Whenever a contractor or subcontractor has job categories with fewer minorities "than would reasonably be expected by their availability," the contractor must establish "goals" for increasing their utilization. 41 C.F.R. § 60-2.10 and 2.11 (1976). The requirement

to establish numerical goals depends upon a finding of statistical imbalance between the contractor's utilization rate for minorities and their availability rate. The existence of prior discrimination by the contractor is irrelevant to the requirement of goals which are designed to remedy simple statistical imbalance, however caused.[22]

A goal is stated as a percentage of the total employees in a job category. The ultimate goal for every job category *must* be equal to the availability rate for that minority group; in other words, each group must be allocated a pro rata share of jobs and promotions. Thus the ultimate goal mandates population parity.[23] 41 C.F.R. § 60-60, XII(B)(a) (1976). Annual numerical goals must be established where the ultimate goal cannot be realized within one year. 41 C.F.R. § 60-60, XII(B)(c) (1976).

If a contractor fails to meet his goals, he must demonstrate that he made "every good faith effort" to meet the numerical goals set.[24] It is not "good

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[22]The Office of Federal Contract Compliance Programs (OFCCP) has stated that the "goals and timetables" required under its implementation of the Executive Orders are "drawn from the principles and concepts of remedy," but states firmly that the quota remedies "need not be triggered by a finding of employment discrimination." 41 Federal Register 40343 (1976).

[23]The contractor is encouraged to maximize the representation of minorities in a number of ways. For example, the OFCCP suggests that in selecting the labor market for determining availability, the contractor "should accept as a relevant labor market the . . . recruitment area which reflects the highest minority population." OFCCP Technical Guidance Memorandum, May 5, 1976.

[24]The cost of showing "good faith effort" is often very high, requiring the contractor to record and justify every decision not to hire or promote a woman or minority. 41 C.F.R. §60-2.12(k)(1), (2) (1976).

faith effort" to fail to meet a goal because the employer hired the best qualified person for the job.[38]

The consequences of a contractor's failure to justify by good faith efforts his falling short of his goals are very severe. The available sanctions for non-compliance range from decisions to cancel, terminate or suspend a contract, 3 C.F.R. § 209(a)(5) (1974), to a decision that the contracting agency refrain from awarding any future contracts to an offending employer, the so-called "debarment." 3 C.F.R. § 209(a)(6) (1974). Debarment is a potent weapon against employers who are heavily dependent upon government contracts. Professor Thomas Sowell, for example, has described it as "a virtual sentence of death to any leading research university." Sowell, "*Affirmative Action*" *Reconsidered*, 41 The Public Interest 47, 51-52 (1975).

The internal dynamics of corporations also contribute to the inevitability of the transformation of goals into quotas. Revised Order 4 provides that "Supervisors shall be made to understand that their work performance is being evaluated on the basis of their equal employment opportunity efforts and results, as well as other criteria." 41 C.F.R. § 60-2.22(a)(8) (1976). This impact of this aspect of the program has been described by Daniel Seligman:

> "In principle, of course, a line manager who is not meeting his targets is allowed to argue that he has made a 'good faith effort' to do so. But the burden of proof will be on the manager, who knows perfectly well that the only sure-fire way to prove good faith is to meet the targets. If he succeeds, no questions will be asked about reverse discrimination; if he fails, he will automatically stir up questions about the adequacy of his efforts and perhaps about his racial tolerance too (not to mention his bonus). Obviously, then, a manager whose goals call for hiring six black salesmen during the year, and who has hired only one by Labor Day, is feeling a lot of pressure to discriminate against white applicants in the fall." Seligman, *How "Equal Opportunity" Turned Into Employment Quotas*, 87 Fortune 160, 167-68 (1973).

[38]For example, the HEW Guidelines, define "reverse discrimination" and "preferential treatment" as the "selection of unqualified persons over qualified ones." Presumably this means that it would not be a preference to hire a marginally qualified or trainable minority over a highly qualified white. *See Cramer v. Virginia Commonwealth University*, 415 F.Supp. 673, 679 n.4 (E.D.Va. 1976), *appeal pending*, (4th Cir. No. 76-1937).

The pressures to meet "goals" both external in the form of the threat of contract cancellation and debarment and internal in the form of supervisor performance evaluations based upon supervisors' success in meeting goals dovetail to result in a quota.

C. Racial Quotas Are Universally Deplored; This Court Has Never Sanctioned or Imposed a Racial Quota or Goal and Lower Courts Have Used Racial Quotas or Goals Only to Redress Specific Past Discrimination and Then Only With Extreme Caution and Restraint.

The evil inherent in a racial quota is amply documented by the history of such devices. To utilize a quota is to make race or ethnicity dispositive in the admissions process. The racial quota at the Medical School excludes highly qualified nonminorities on an arbitrary basis even where the fifteenth or sixteenth minority person admitted may only be minimally or marginally qualified. Even Counsel for Petitioner Archi-

bald Cox, has recognized that a fixed target quota for admissions based on race or ethnicity is a greater cause for concern than is a program which simply includes race as a factor. Brief of the President and Fellows of Harvard College Amicus Curiae at 16-17, 30, 42 and 50-51, *DeFunis, et al. v. Odegaard, et al.*, 416 U.S. 312 (1974).

Racial quotas and proportional representation formulae perpetuate and legitimatize racial consciousness particularly when imposed by the government.[26] The firm goal of nondiscrimination becomes submerged in a thrashing sea of competing group demands. Quotas are divisive and may lead to racial antagonism. Under a mentality of racial proportionality, every non-minority male who fails to get a promotion or job or grant which went to a minority individual has the luxury of believing himself to be discriminated against—whether his credentials were inferior or superior. The minority individual gains little acknowledgement of his genuine achievements.

No decision of this Court has adopted or endorsed the notion of imposed statistical parity in the distribution of government benefits. This Court has specified that the Equal Protection Clause does not create substantive entitlement to proportional representation on the basis of race, religion or ethnicity. The concept of proportional representation for groups is absolutely antithetical to the concept of individual rights embodied in the Equal Protection Clause—"No state shall . . . deny to *any person* within its jurisdiction the equal protection of the laws."

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[26]Kaplan, *Equal Justice in an Unequal World*, 61 Nw. L. Rev. 363, 379-380 (1966).

This Court has rejected unequivocally the idea that there is a "substantive constitutional right [to] any particular degree of racial balance or mixing" and has expressly disavowed the permissibility of a fixed racial balance or quota in *Swann v. Board of Education*, 402 U.S. 1, 24 (1971) and its progeny.[27] The Court has held that there is no requirement of pro rata racial representation on juries. *Cassell v. Texas*, 339 U.S. 282, 286-87 (1950). Nor do members of minority groups have a federal right to be represented in legislative bodies in proportion to their numbers in the general population; *Beer v. United States*, 425 U.S. 130, 136-37 n.8 (1976); *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971). *Cf. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Moreover, in *Hughes v. Superior Court*, 339 U.S. 460 (1950), in a First Amendment context, this Court expressed unequivocal disapproval of the notion of racial proportionality by explicitly refusing to extend constitutional protection to picketing by black persons to compel a store to hire black clerks in proportion to the number of its black customers. The Court quoted with approval the statement of the Supreme Court of California that the pickets

> "would make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown

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[27]*Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 434 (1976); *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 740-41 (1974); *Winston-Salem/Forsyth County Board of Education v. Scott*, 404 U.S. 1221 (1971).

and red, would have equal rights to demand discriminatory hiring on a racial basis." *Id.* at 463-464, quoting 32 Cal. 850, 856 (1948).

This Court then stated:

"[t]o deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities." *Id.* at 464.

Thus, far from endorsing the concept of distribution of government benefits to groups on the basis of their proportions in the population, this Court has specifically disapproved and denied constitutional protection for such a purpose. *Cf., Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50 (1975).

Lower courts have never sanctioned the indiscriminate use of racial quotas or goals even to remedy specific instances of past racial discrimination in employment. Rather, courts have approached the device with extreme caution and restraint, conscious of the need to protect the rights and expectations of innocent nonminorities. The judicial tolerance of quotas is minimal and is consistent with the principle that "quotas merely to attain racial balance are forbidden, [but] quotas to correct past discriminatory practices are not." *United States v. Wood, Wire & Metal Lathers Local 46,*

471 F.2d 408, 413 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973).

Absolute preferences are forbidden even as a remedy. *Carter v. Gallagher,* 452 F.2d 315 (8th Cir.), *cert. denied,* 406 U.S. 950 (1972). The quota method is temporary, designed and permitted to remain in effect only for a limited period of time. *See e.g., NAACP v. Allen,* 493 F.2d 614, 621, (5th Cir. 1974); *Carter v. Gallagher,* 452 F.2d at 330; and *Rios v. Enterprise Ass'n Steamfitters, Local 638,* 501 F.2d 622, 628 n.3 (2d Cir. 1974).

Court-imposed numerical quotas and goals are strictly fashioned to go no further than necessary to eliminate the continuing effects of proven illegal racial discrimination. Certainly such remedies are not imposed merely upon a showing of statistical disparity between an employer's work force and the demographic statistics of the hiring area as the Executive Order requires.[28] The judicial remedies are strictly circumscribed in time and scope and are subject to the continuing jurisdiction of the court. Judicial quotas and goals embody no concept of a permanent, mandatory allocation of scarce and valuable resources to particular specified groups within the population according to their numbers.

Instead, courts have been extremely critical of racial quotas directed at achieving proportional representation for particular groups. For example, the New York Court

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[28]Courts do frequently make use of evidence of statistical disparities to prove violations of the antidiscrimination statutes. Statistics provide a rough tool for evaluating the probabilities of racial discrimination by a particular employer or union. *See,* B. Schlei & P. Grossman, *Employment Discrimination Law,* 1161-93 (1976). This tool of measurement for racial discrimination rests upon an assumption that "absent explanation,

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of Appeals, the same court which decided *Alevy v. Downstate Medical Center, supra* at note 3, confronted the issue of the permissibility of racial quotas in *Broidrick v. Lindsay*, 39 N.Y.2d 641, 350 N.E.2d 595, 385 N.Y.S.2d 265 (1976). There, the court held illegal an affirmative action regulation imposed by the mayor which required construction contractors doing business in New York City to meet prescribed minority hiring percentages. The court found the regulations conflicted with the antidiscrimination provisions of the New York City Administrative Code, noting:

> "There is a dramatic distinction between the expressed legislative policy of prohibiting the employment discrimination and the mayoral policy of mandating employment 'percentages,' however disavowed unpersuasively as being quotas. Prohibition of discrimination, properly utilized, allows individual employment opportunity without invidious impediments. . . . But mandating percentages displaces the standard of individual merit with a standard that work forces reflect the ethnic composition within the relevant geographic area even if distribution based on merit would produce a different composition." *Id.* at 647, 350 N.E.2d at 598, 385 N.Y.S.2d at 268.

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it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *International Brotherhood of Teamsters v. United States*, 45 U.S.L.W. 4506, 4510 n.20 (1977). In fashioning a remedy for past discrimination courts will often make use of this same rough tool to measure progress in the elimination of the discrimination. Courts have, however, never made the conceptual leap of equating the tool of measurement by statistics with the goal of statistical representation as an end in itself wholly unrelated to any finding of employment discrimination.

The *Broidrick* court expressly cautioned that *Alevy* did not validate the use of a r ial quota.

The Supreme Court of New Jersey reached a similar conclusion in *Lige v. Town of Montclair*, 72 N.J. 5, 367 A.2d 833 (1976). Striking down a hiring and promotional quota imposed by a state administrative agency as violative of both the New Jersey law against racial discrimination and the New Jersey constitution, the New Jersey court described the quota device as "pernicious." *Id.* at 14, 367 A.2d at 842.

A number of courts have sustained challenges to affirmative action quotas on the grounds that they discriminate against nonminorities or males in violation of antidiscrimination statutes. For example, in *Weber v. Kaiser Aluminum & Chemical Corp.*, 415 F. Supp. 761 (E.D. La. 1975), *appeal pending*, (5th Cir. No. 76-3266), the trial court held that a preferential hiring and promotion quota for blacks, voluntarily adopted in the absence of a judicial finding of past discrimination, violated the antidiscrimination and anti-preference provisions of Title VII. Preferential treatment in the form of racial quotas may only be imposed by a court upon a finding of past discrimination. *Id.* at 767-68.

In *Cramer v. Virginia Commonwealth University*, 415 F. Supp. 673 (E.D. Va. 1976), *appeal pending*, (4th Cir. No. 76-1937), the court disapproved of the implementation of an affirmative action program where the university had disregarded all applications from males for two vacant teaching positions, considering only applications from females. The court soundly criticized the policy of the federal government; stating:

> "By requiring employers to engage in widespread, pervasive and invidious sex discrimination through

> the implementation of pervading affirmative action programs, the U.S. Government is merely perpetuating the very social injustices which it so enthusiastically and properly seeks to remedy." *Id.* at 680.

The court concluded that a quota involved "the use of an unconstitutional means to achieve an unconstitutional end." *Id. See also, Anderson v. San Francisco School District,* 357 F.Supp. 248 (N.D. Cal. 1972) (voluntarily imposed racial quota violates 42 U.S.C. §1983, Title VI and the Fourteenth Amendment); *Brunetti v. City of Berkeley,* .... F.Supp. ...., 12 F.E.P. Cases 937 (N.D. Cal. 1975) (racial quota barred in absence of past discrimination); *McAleer v. A. T. & T. Co.,* 416 F.Supp. 435 (D.D.C. 1976); *Hupart v. Board of Higher Education,* 420 F. Supp. 1087 (S.D.N.Y. 1976); *Flanagan v. Georgetown College,* 417 F. Supp. 377 (D.D.C. 1976).

The demand articulated in these cases that affirmative action programs be administered so as not to result in illegal discrimination appears to be consistent with the view of the Equal Employment Opportunity Commission. See EEOC Decision 75-268, 10 FEP Cases 1502 (1975), where the Commission indicated that majority group members cannot automatically be excluded "even in the name of affirmative action." Rather, the Commission stated, "[a]ffirmative action plans must be administered in a manner legally consistent with the non-discriminatory principle of Title VII." *Id.* at 1503.

All courts which have permitted racial remedies have expressed concern for the rights and legitimate expectation of nonminorities.[29] In the recent *Teamsters* case this Court indicated that the rights of identifiable victims of proven racial discrimination must be balanced, using principles of equity, against the "legitimate expectations of other employees innocent of any wrong doing" 45 U.S.L.W. at 4518. The Court stated:

> "[e]specially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must 'look to the practical realities and necessities inescapably involved in reconciling competing interests'" in order to determine an appropriate remedy. *Id.* at 4519.

Courts have been particularly reluctant to use racial quotas as remedies for past employment discrimination where identifiable nonminority persons would be adversely affected. In *Kirkland v. New York State Department of Correctional Services,* 520 F.2d 420 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976), the court struck down a promotional quota, reasoning:

> "One of the most controversial areas in our continuing search for equal employment opportunity is the use of judicially imposed employment quotas. The replacement of individual rights and

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[29] *International Brotherhood of Teamsters v. United States,* 45 U.S.L.W. 4506 (May 31, 1977); *Kirkland v. New York State Department of Correctional Services,* 520 F.2d 420 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976); *NAACP v. Allen,* 493 F.2d 614 (5th Cir. 1974); *Carter v. Gallagher,* 452 F.2d 315 (8th Cir.), *cert. denied,* 406 U.S. 950 (1972).

opportunities by a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society.

"The most ardent supporters of quotas as a weapon in the fight against discrimination have recognized their undemocratic inequities and conceded that their use should be limited. Commentators merely echo the judiciary in their disapproval of the 'discrimination inherent in a quota system.' " *Id.* at 427 (footnotes omitted).

See also, Equal Employment Opportunity Commission v. Local 638, Sheet Metal Workers International Ass'n, 532 F.2d 821 (2d Cir. 1976), where the court relied on *Kirkland* in enunciating the following rule:

"[T]he imposition of racial goals is to be tolerated only when past discrimination has been clear-cut and the effects of 'reverse discrimination' will be diffused among an unidentifiable group of unknown, potential applicants rather than upon an ascertainable group of easily identifiable persons." *Id.* at 828.

The *Local 638* court indicated by way of dicta that the rule set out above would not have justified the "reverse discrimination" involved in the *DeFunis* case. The court reasoned there was no record of past discrimination at the University of Washington and the number of places in the law school was absolutely limited. The court observed that, unlike a union, a law school cannot expand its membership so as to dilute the impact of a racial preference upon nonminorities. Thus, the court's dicta concluded, the impact of the racial preference in *DeFunis* was concentrated upon a "small and narrow group of persons, *i.e.*, the applicants next in line . . ." contrary to the rule enunciated. *Id.* at 828.

The principles which emerge from the cases are clear and consistent with the nondiscrimination principle of the Civil Rights Acts and the Fourteenth Amendment. The use of a racial quota is utterly antithetical to the principles and values of a democratic society.

Despite the vehement assertions of Amici and Petitioner that the racial quota herein is the only way to achieve racial justice, it must be seriously questioned whether this most ugly of historical relics, the racial quota, should be resurrected as a rational means of achieving a color blind society. Certainly it should be imposed only upon a showing of necessity which is based upon actual experience with less dangerous alternatives rather than upon hypothesis and conjecture. The goal of a nondiscriminatory society where bounty and burden fall equally upon individuals, not races, is universally revered—the only question in this case is whether a most discredited means is justified as a means of achieving the desired goal. The answer must be an unequivocal no. It does not serve the creation of an integrated nation for the government to impel ever sharper and more meaningful consequences of race.

Conclusion

For the reasons stated above, the Chamber urges that the decision of the Supreme Court of California be affirmed.

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